No. 21,130

In the United States Court of Appeals for the Ninth Circuit

TONKIN CORP. OF CALIFORNIA d/b/a SEVEN UP BOTTLING CO. OF SACRAMENTO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and Cross-Petition to Enforce a Supplemental Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Tonkin Corp. of California (herein "the Company") to review a supplemental order of the National Labor Relations Board issued May 27, 1966, after proceedings pursuant to this Court's remand. *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509. In its answer, the Board has requested enforcement of its order. The

Board's supplemental decision and order are reported at 158 NLRB No. 110. This Court has jurisdiction of the proceeding under Sec. 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), the unfair labor practices having occurred in Sacramento, California, where the Company bottles and sells soft drinks.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

In its initial decision and order, reported at 147 NLRB 401, the Board found that the Company violated Section 8(a)(2) of the Act by interfering with the administration of the Sacramento Seven-Up Employees' Union (herein "the Union"), and by locking out its employees in order to secure immediate acceptance of its new contract terms by the Union so that it could forestall organizational efforts of the rival Teamsters and keep the Union subservient to it.[1] The Board reaffirmed this finding in its supplemental decision and also reaffirmed its conclusion that the lockout was designed to discourage membership in the Teamsters and encourage membership in the Union, and hence that the Company thereby also violated Section 8(a)(3) and (1) of the Act. The facts are these:

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[1] The Board also found in its prior decision that the Company discriminatorily discharged William Barwise because of his activities on behalf of the Teamsters. This finding was affirmed by this Court (*N.L.R.B.* v. *Tonkin, supra,* at p. 511) and is not in issue here.

A. *The Union*

For a number of years the employees of the Company have been represented by the Union. They comprise its entire membership and are required to belong as a condition of employment (R. 16; Tr. 46-47, 131-132, 406-407, GCX 2, p. 6). The Union was established internally at the Company at an undisclosed date in order "to keep the Teamsters out" (Tr. 422) and has functioned fitfully since its inception (Tr. 418, 420). In 1961, during the presidency of employee Jim Elder, the Union first acquired by-laws (Tr. 108). It has no office (Tr. 412), keeps sporadic records (Tr. 412, 420), and its infrequent meetings have been primarily social (R. 16; Tr. 125-127, 116-120, 9, 85, 403, 412-413, 418-422). Business meetings are held only to elect officers and during contract negotiations; no grievances have ever been processed (Tr. 419, 413, 422-423). In 1963, President Elder resigned from the Union, having been promoted to a supervisory position (Tr. 126-127) and in February of that year, Howard Hill became president (Tr. 85).

B. *The contract negotiations*

Shortly after the election of new officers, the Union and the Company began negotiations for a new contract. Several inconclusive meetings were held and on March 27, four days before the existing contract was to expire, the employees rejected the Company's most recent offer (Tr. 15-18). On Friday evening, March 29, Company President Harry Tonkin held a meeting of all employees to discuss the contract (R. 16; Tr. 17-19). Tonkin told the men that they could not go

to work Monday morning unless the contract was signed [2] (R. 17; Tr. 160, 76-77, 25-26, 107-108, 258). He added that the Company would find new men to take the place of those who did not want to work (Tr. 160, 107). Tonkin further stated that he knew that some of the employees had been approached by the Teamsters and asserted that he did not want to negotiate with the Teamsters (R. 17; Tr. 20-22, 76, 155-160, 271-272).

After Tonkin left, the employees discussed the Company's contract proposal. Although it was generally agreed that the men should get what the rest of the industry was getting, not enough men remained at the meeting to take a vote. (R. 16; Tr. 23-25, 99-102, 340, 334). Later that evening, a small group of employees, including Union President Howard Hill, and William Barwise, its secretary-treasurer, went to the Company's office to confer with Harry Tonkin and his brother Millard, the Company's vice-president *(ibid.)*. Hill said that in discussing contract matters he could make no final commitment, because any agreement would be subject to ratification by the Union membership (Tr. 101-102, 262). The employees asked for concessions on such items as holidays, a bonus plan, sick leave, and health and welfare, but Tonkin either rejected the requests or merely replied that the Company would do the best it could in the

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[2] Three employees testified to this statement by Tonkin: Union President Hill (Tr. 107-108); Secretary-treasurer Barwise (Tr. 76); and Donald Olson (Tr. 160). Furthermore Harry Tonkin admitted that he told the employees that they could come to work "under these conditions" (Tr. 258).

future and refused to incorporate any of these matters into the written contract (Tr. 100-101, 108-109, 62-65).

The employees expressed dissatisfaction at the Company's offer of a three dollar a week raise. The Tonkins offered to match any higher rate paid by the local Pepsi-Cola bottling concern. The employees present expressed satisfaction with this point, Mr. Tonkin offered to find out what "Pepsi" was going to do, and the meeting broke up (Tr. 82-83). The next day, Saturday, Millard Tonkin called the president of the Pepsi-Cola concern to ask about their wage rate, but learned that Pepsi-Cola too was deadlocked over wages. Tonkin then called Bernal Williams, an employee who had been at the meeting, and reported this development to Williams (Tr. 299).

C. *The lockout*

On Sunday, March 31, Hill, Barwise, and Williams, at Barwise's suggestion, met with some Pepsi-Cola employees and a Teamsters representative (R. 17; Tr. 26-27). Barwise signed a Teamsters card himself and during that afternoon and the next morning solicited other Company employees on behalf of the Teamsters (R. 17; Tr. 26-28). By Monday morning he and Hill had submitted 9 bargaining authorization cards to the Teamsters from among the Company's 17 employees *(ibid.)*.

On Monday morning, April 1, the Company employees found the gate to the truck yard locked (R. 17; Tr. 29, 129, 162). They were unable to go to work and stood around outside the building (R. 17; Tr. 141,

337). When all the employees reported for work, Harry Tonkin assembled them in the plant office and announced that no one could go to work until the contract was signed (R. 17; Tr. 163-164). Tonkin told the men, "We have this contract and if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials" (R. 17; Tr. 163-164, 131). Tonkin also observed that if the men did not want to work, the Company had no lack of job applicants (R. 17; Tr. 164). He added that he knew some of the employees had been contacted by the Teamsters and questioned why the men wanted to be "dominated" by that union (Tr. 30). During the course of the meeting, the employees twice withdrew to vote on the Company's proposal and twice rejected it (R. 17; Tr. 31-36, 162-163). Following the second vote, however, the men began to wander back into the plant. Later that morning, Hill and Barwise signed the contract without formal approval of the membership *(ibid.)*. While they were signing the contract, Harry Tonkin or his brother, Millard, said that the Company would find out who had solicited cards for the Teamsters, and Barwise admitted that he had done so (R. 17; Tr. 35-36).

D. *Subsequent events*

On April 2, the Teamsters filed with the Board's regional office a petition for a representation election among the Company's employees (R. 18; GCX 3a). The regional office then wrote the Company and the Union notifying them of the petition and asking if any collective bargaining agreement was in effect (R.

18; Tr. 69-71, RX 2). The Union was advised that if it claimed any interest in the proceeding, it should reply by April 8, 1963, forwarding two copies of any contracts it had with the Company, and that if it did not reply the Board would assume that it had no interest (R. 18; RX 2). On April 5, the Tonkins summoned Hill and Barwise to the Company's office and questioned them about the letters from the Board (R. 18; Tr. 36-40, 110-111). Hill explained that the Teamsters' petition had been filed as a result of the cards which he and Barwise had solicited (R. 18; Tr. 137). The Tonkins offered to make a copy of the contract for the Union to submit, but Hill said that he had not decided whether to reply (R. 18; Tr. 38). The next day, Hill and Barwise advised Millard Tonkin that the Company could do as it wished, but the Union was not "going to do anything about it in any manner whatsoever" (R. 18; Tr. 39-40, 110-111). Thereupon Millard Tonkin mailed a copy of the contract to the Board on behalf of the Company and another copy on behalf of the Union (R. 18; Tr. 318-319, 324). The latter was in an envelope bearing the Union's return address, with a letter of transmittal reading:

> The enclosed contracts are sent as requested by the NLRB
>
> 7-Up Employees Union of Sacramento

On April 9, the day after receiving a copy of the charge in this case, the Company discharged Barwise, allegedly for failure to keep up his sales (R. 18; Tr. 41, 48, 286-287).

On April 24, the Tonkins called Hill into their office and said that the labor problem had proved unsettling. Hill was asked ". . . if we couldn't try to figure out some way where we could get the fellows back to work in peace of mind on the job . . ." The Tonkins asked who was responsible for the unfair labor practice charge. Hill said he would try to find out but then dropped the subject (R. 20; Tr. 91-97). Two days later, Hill called a meeting of the Union membership and asked for a vote of confidence on whether to continue pressing the unfair labor practice charge. A majority voted to continue pressing the charge (R. 20; Tr. 103-106).

The Board's Conclusions and Order

In its initial decision, the Board found, *inter alia*, that the Company violated Section 8(a)(2), (3) and (1) of the Act by locking out its employees and otherwise interfering with the employees' choice of bargaining representative. The Board ordered (R. 23-24, 72) the Company to cease and desist from the violations found and from in any other manner abridging the employees' rights under the Act, to withdraw recognition from the Union unless and until it is certified as bargaining representative by the Board, to reimburse the employees with interest for dues checked off under the April 1 contract, and to post appropriate notices.

The Board also found that the Company, in violation of Section 8(a)(3) of the Act, discharged William Barwise because of his advocacy of the Teamsters and opposition to accepting the contract. This

Court enforced the Board's order as to reinstatement of Barwise commenting "[the Company's] knowledge of Barwise's efforts on behalf of the Teamster representation, coupled with the timing of the discharge, persuade us that the Board could reasonably have drawn the inference it did . . . ." *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509, 511. However, the Court, in light of the Supreme Court's intervening decision in *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, remanded the case to the Board to reassess the legality of the lockout. *Tonkin Corp., supra,* 352 F. 2d at 510-511. The Court noted that there the Supreme Court had upheld the lockout as an offensive weapon "to support a legitimate bargaining position, after an impasse in collective-bargaining negotiations had been reached." *Supra,* at 510. Here, however, the presence of "evidence that [the Company] was inhospitable to any prospect of the Teamsters' Union becoming bargaining representative" combined with the organizational activity "interspersing the collective bargaining process" led the Court to remand to the Board to examine these circumstances in light of the holding in *American Ship. (Ibid.).*

The Board, on remand, reaffirmed its initial decision and order. The Board pointed out that here, unlike in *American Ship,* the Company's use of the lockout was designed, not to achieve legitimate economic demands, but to "frustrate the process of collective bargaining by preventing a free choice of a bargaining representative by the employees."

ARGUMENT

I. Substantial Evidence on the Whole Record Supports the Board's Finding That the Lockout Was Designed to Frustrate the Employees' Ability to Freely Select a Bargaining Agent

A. *The controlling principles*

In *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, the Supreme Court upheld the legality of the lockout employed "solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached." *Id.* at 308. Cf. *N.L.R.B.* v. *David Friedland Painting Co., Inc.*, —— F. 2d —— (C.A. 3, No. 16032, decided April 25, 1967, sl. op. pp. 7-9, 65 LRRM 2119, 2123). Stressing the limited nature of the issue posed for decision, the Court added, "This is the only issue before us, and all that we decide." *Ibid.* The Court went on to outline the kinds of lockouts not legalized by its decision. The Court cautioned:

> It is important to note that there is here no allegation that the employer used the lockout in the service of designs inimical to the process of collective bargaining. There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining." *Id.* at 308-309.

The Court further noted that the unions involved in *American Ship* "have vigorously represented the em-

ployees since 1952, and there is nothing to show that their ability to do so has been impaired by the lockout." *Id.* at 309. The Court concluded that for a lockout to be proscribed "the Board must find that the employer acted for a proscribed purpose." *Id.* at 313, or that the necessary effect of the lockout implies such a purpose. *Id.* at 311-312. See *N.L.R.B.* v. *Golden State Bottling Co.*, 353 F. 2d 667, 669-670 (C.A. 9).

B. *The Company's motive in locking out its employees to force their immediate acceptance of the contract was to prevent Teamsters' organizational efforts and keep the Union subservient to it*

As shown in the Counterstatement, the Union was a weak, loosely organized group originally established to keep the Teamsters out of the plant. Its sporadic activities were mainly social and its militancy can be measured by the fact that it had never processed a grievance. The Union's weakness was further reflected in its impotency at the bargaining table. It could not even convince the Company to incorporate in the contract concessions to which Company President Harry Tonkin orally agreed (Tr. 100-101, 108-109, 62-65). Moreover, Harry Tonkin's confidence in his ability to manipulate the Union is well demonstrated by his assertion on the morning of the lockout that "if any of the Union officials don't want to go to work, we will have a new election and get new plant union officials." In light of these facts, it is not surprising that President Tonkin preferred to deal with the Union rather than with the Teamsters.

President Tonkin was quite emphatic about this preference for bargaining with the Union. At the Friday evening meeting, March 29, Tonkin announced that he did not want to negotiate with the Teamsters. He added that he knew some of the men had been approached by that organization.[3] He repeated these statements on Monday morning when he told the men that he wanted a contract with the Union and that nobody was going to work until he got the contract signed.

Even after the employees capitulated and signed the contract, the Company continued its efforts to forestall any organizational efforts on behalf of the Teamsters. By questioning, it learned that William Barwise had been the principal solicitor for the Teamsters. When the Teamsters filed a petition for a Board election and the Company learned that the Union was not going to assert its contract as a bar to the election,[4] it unilaterally filed papers in the Union's name to assert that claim. Finally, with the filing of an unfair labor practice charge which could invalidate

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[3] The record does not disclose evidence of organizational efforts by the Teamsters among the Company's employees—as opposed to other Sacramento soft-drink employees—prior to Sunday, March 31. The important point, however, is that Tonkin clearly thought that the Teamsters were trying to organize his plant and wanted to forestall such attempts. Whether or not organizational activity had actually commenced at that point is immaterial to the issues here.

[4] Under the Board's contract-bar rule, an election petition will not be entertained for the duration of a collective bargaining agreement covering the unit or for 3 years from its execution, whichever is less. General Cable Corp., 139 NLRB 1123.

the contract—and remove it as a bar to an election,[5] the Company fired Union official Bill Barwise. It then called in Union President Hill to see if the unfair labor practice charge could be settled "amicably and peaceably and everyone could go to work and not have this hanging over their heads" (Tr. 95). From these facts, the Board concluded that the purpose of the Monday morning lockout was not to force acceptance of legitimate contract demands. Rather, it was part of a plan to forestall Teamsters organizational efforts while simultaneously keeping the Union malleable to its will. It has long been settled that a lockout to discourage employee interest in a disfavored union or promote a favored union violates Section 8(a)(3) of the Act. See, for example, *N.L.R.B.* v. *National Motor Bearing Co.*, 105 F. 2d 652, 657-658 (C.A. 9); *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 240, 243 (C.A. 9), cert. den., 326 U.S. 735.

Of course, in circumstances such as these, a lockout *could* have been related to a simple desire to secure the fruits of collective bargaining, but the only fact in the record which adequately explains the Company's haste in securing the contract—or its subsequent unlawful efforts to protect that contract—is the threat posed by Teamster affiliation. And as this Court noted when the case was here before (352 F. 2d at 511), the events of Teamster activity "were intimately interlaced with the events of April 1 and the earlier company-union contract negotiations." Accordingly, as the Court earlier recognized with respect

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[5] See *N.L.R.B.* v. *Spiewak, et al.*, 179 F. 2d 695 (C.A. 3).

to the discharge of Barwise (352 F. 2d at 511), the question is not whether the Company *had* "justifiable grounds which, under other circumstances, might have permitted [its action]," but whether the Company's conduct was in fact motivated in whole or in part by a desire to discourage negotiation through the Teamsters. Accord: *N.L.R.B.* v. *Security Plating Co., Inc.*, 356 F. 2d 725, 728 (C.A. 9); *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 470 (C.A. 9). The Company apparently recognizes this controlling authority, because it argues throughout its brief that the "sole" motivation for the lockout was to bring pressure in aid of the Company's "good faith bargaining position." Thus, the Company does not contend that it was privileged to use the lockout to deprive its employees of union representation of their own choosing, but argues that its activity was unrelated to that aim.

In keeping with this contention, the Company, in its brief, disputes the facts as found by the Board. The Company contends that on Friday evening, March 29, the Union had agreed to accept its proposed contract and avers that all concerned considered the ratification meeting on the following Monday to be a mere formality. (Pet. brief pp. 12, 14, 30-36). But the Company ignores the crucial fact that central to what the employee representatives tentatively agreed to accept was the Company's offer to match the wage rate prevailing in the industry, specifically that of the Pepsi-Cola Bottling Company. Even the Company's own witnesses testified to this effect. (Tr. 340, 334). The representatives did not agree to ac-

cept the Company's wage offer and, once it was discovered that "Pepsi" was deadlocked on wages, there was no agreement on wages at all. Moreover, the Company does not dispute that the Union representatives told the Tonkins that no agreement could be made without a ratification vote by the membership. Rather, it suggests—without claiming the support of any record evidence—that such a vote was not required by the Union's by-laws and was part of a plot by the Union's officers to repudiate the contract on behalf of the Teamsters. (Pet. br. pp. 36-37). Such speculation is groundless; the Union officers were not even approached by the Teamsters until Sunday, two days after they had informed the Tonkins that a ratification vote would be necessary.

Next, the Company asserts that there was no lockout; that the Tonkins locked the gate on Monday morning not to prevent the employees from working but for the purpose of facilitating the ratification vote. (Pet. br. pp. 16, 37-38). The Company ignores the credited evidence that Harry Tonkin—both on Friday evening and Monday morning—told the employees that they would not be allowed to work without a contract. Moreover, as a witness Harry Tonkin as much as admitted he had made such a threat on Friday evening. When asked:

> "did you say anything to the effect that anyone who did not accept the contract would not be permitted to work?"

Tonkin replied:

> "I didn't put it that way, sir"

He then explained how he did "put it."

> "we pointed out that we have a contract with you, we hope to renew it. We hope that you will accept our proposition. We have no intention of discharging anybody. *Any of you who want to come to work Monday morning under these conditions, are more than welcome. If anybody felt that they couldn't agree or did not feel that they want to work under these conditions, that was their privilege to do what they want.*" (emphasis supplied). (Tr. 257-258).

Moreover, three employees testified that Harry Tonkin said on Friday evening that the men could not work without a contract.[6] Then on Monday morning, in case the locked gate did not make the Company's position sufficiently clear, Tonkin assembled the men in his office and told them that no one could work until the contract was signed. These facts clearly establish the existence of a lockout.

Finally, the Company claims that even if there were a lockout, its purpose was only to force ratification of the contract already agreed upon and was therefore lawful under the rule of *American Ship*. But, as we have shown, no agreement had been reached on the contract on Friday evening. Furthermore, the Company's assertions that it was the union leaders in tandem with the Teamsters rather than itself that frustrated representation by the Union is not borne out by the evidence (Pet. br. pp. 50-53). Again this position is based on the erroneous assump-

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[6] Petitioner errs in its brief (p. 10, n. 7) in stating that only one employee so testified (*supra*, p. 4, n. 2).

tion that agreement was reached on Friday evening. Secondly, it ignores the fact that the union leaders did not seek out the Teamsters. Rather they encountered the Teamsters representative when meeting with an employee of "Pepsi" to discuss their common concern over wages in the industry. Furthermore it is clear that a majority of the employees supported their leaders as the only votes taken on Monday morning repudiated the contract offered by the Company. Finally, three weeks after the unfair labor practice charge was filed, and after the Company had spoken to Union President Hill about it in an attempt "to figure out some way where we could get the fellows back to work in peace of mind on the job," the membership voted to continue pressing the charge, thus giving their leaders a vote of confidence.

We submit that the record amply supports the facts as found by the Board. In contrast, the version of the facts advanced by the Company, but discredited by the Examiner and the Board both in the initial proceeding and on remand, is not borne out by the record. Nor is the Company correct in stating that this Court must apply a special, more rigorous standard in evaluating the evidence in a case where the Board had credited the General Counsel's witnesses and discredited those of the Company (Pet. br. p. 27).[7] The line of cases in the Fifth Circuit that the

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[7] In any event as shown in the Counterstatement, the Examiner did not discredit all of the Company's witnesses. Even if he had done so, even the "total rejection of an opposed view cannot impugn the integrity or competence of a trier of fact." *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659.

Company relies on for this proposition was expressly disapproved by the Supreme Court in *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404. There the Supreme Court reiterated the applicable standard:

> "We granted certiorari because there was a seeming non-compliance by [the Fifth Circuit] with our admonitions in *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474. We there said that while 'the reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view,' it may not 'displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' "

Finally, the Company argues (Br. 60) that the Board's decision condemns the Company for not breaking off negotiations with the Union and for not extending "preference and support" to the Teamsters. Of course, this contention is totally without foundation. What the Board found unlawful was the Company's coercion of its employees—that is, its interference in the *internal* affairs of the Union and its attempts to *discourage* Teamster affiliation. Cf. *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 459 (C.A. 9). Nothing in the Board's order suggests that the Company should have erred in the opposite direction.

CONCLUSION

For the reasons stated, we submit that a decree should issue denying the petition for review and enforcing the Board's order in full.

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May 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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